



JENNIFER M. GRANHOLM
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF ENVIRONMENTAL QUALITY
LANSING



STEVEN E. CHESTER
DIRECTOR

June 15, 2009

1. Bill Number and Sponsor:

Senate Bill 437

Senator Jason Allen et al.

Referred to Committee on Economic Development and Regulatory Reform

House Bill 4903

Representative Dave Agema et al.

Referred to Committee on Great Lakes and Environment

2. Purpose:

These bills, which are identical, amend the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (NREPA), by modifying the definition of "facility" in section 20101, and adding new provisions about cleanup criteria in section 20120a. Non-substantive editorial changes are also made by both bills.

3. How This Legislation Impacts Current Programs in the Department:

Facility Definition

The bills would exclude from the definition of facility any site where applicable site-specific cleanup criteria are satisfied (and where other hazardous substances are cleaned up according to residential cleanup criteria).

The department generally supports the concept of excluding from the definition of facility those sites where site-specific cleanup criteria have been satisfied, provided that the site-specific criteria do not depend on land or resource use restrictions to be valid and applicable. As written, the bills would allow the termination of facility status on the basis of site-specific criteria that depend on use restrictions (e.g., the criterion is appropriate to apply to non-residential land use, but land use is not restricted to residential).

Use of United States Environmental Protection Agency (U.S. EPA) Criteria In Lieu of State Criteria

The bills would prevent the Department of Environmental Quality (DEQ) from establishing or enforcing cleanup criteria that are "more stringent than comparable criteria established or published" by the U.S. EPA. There is no definition in the bills for "comparable criteria," and without a definition it is impossible to accurately assess the impact of the bills.

The U.S. EPA does not establish or publish criteria of general applicability (referred to under the Michigan cleanup and redevelopment program as "generic" criteria). Many values established by U.S. EPA are not intended to provide for long-term protectiveness, as are the Part 201 cleanup criteria – U.S. EPA's values are often directed at assessing short-term risk and/or indicating the need for immediate intervention to prevent unacceptable exposure. Another significant difference between the state and federal programs is that the U.S. EPA regulates within a range of acceptable risk for cancer. They view as acceptable increased cancer risk of 1 in 10,000 to 1 in 1,000,000 occurrences above the background rate. In contrast, Part 201 has a fixed level of acceptable cancer risk rather than a range; 1 in 100,000 is acceptable.

The U.S. EPA determines the applicability of values it establishes to cleanup actions on a case-by-case basis. This U.S. EPA approach results in there being many different cleanup levels for the same chemical and land use. There may be several different "comparable criteria" that were established by the U.S. EPA at different sites for the same chemical, exposure pathway (e.g., soil direct contact or drinking water), and land use (e.g., residential or industrial).

The bills are also specific in saying that, in cases where state criteria are more stringent than "comparable EPA criteria," the state would not be able to ask for state standards to be met by parties who are conducting cleanup under the authority of the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Public Law 96-510 (commonly referred to as CERCLA or Superfund). Because the proposed Section 19 (B) states that this rollback would apply at sites where the cleanup "is underway or is complete," existing cleanup decisions would have to be revised to be less protective at Superfund sites where the U.S. EPA has lead responsibility for oversight of the project. The effect of the bills on Superfund projects where DEQ has lead responsibility for oversight is not clearly addressed by the bills.

It is critical to note that there would be no enforceable cleanup criteria for those substances and exposure pathways where there are "comparable criteria" from the U.S. EPA. The absence of state generic cleanup criteria would have the following consequences:

- It would require that each decision about the need for cleanup and the adequacy of cleanup be made on a case-by-case basis. This would lead to significant inefficiencies and is contrary to the state's goal of encouraging prompt, predictable brownfield redevelopment.
- Regulatory requirements would be eviscerated for liable parties who are obligated to remediate contaminated property. Similarly, there would not be a clear basis for those who have limited "due care" obligations to assure safe use of contaminated property. Cleanup and "due care" obligations are triggered by property being a facility. In the absence of generic state cleanup criteria, property would not be a facility and these parties would have no obligations to address risks for those hazardous substances.

- It would be impossible for persons to qualify for brownfield redevelopment financial incentives. Eligibility for incentives requires that property be a facility, meaning that there be a demonstrated exceedance of one or more of the state's generic cleanup criteria.

4. Introduced at Agency Request:

No.

5. Agency Support:

No.

6. Justification for the Department's Position:

Facility Definition

The DEQ could support the concept of terminating facility status for a site where site-specific criteria are satisfied if the bills were modified to address the issue of land and resource use restrictions.

Use of U.S. EPA Criteria In Lieu of State Criteria

The availability of generic cleanup criteria is essential to the efficient functioning of the state's cleanup and redevelopment program. The availability of generic criteria has been cited by many interests as a strong point of the state's program because it assures predictability and certainty, and takes away the need for case-by-case decision making. The adoption of values developed by the U.S. EPA for use on a site-specific basis elsewhere in the country may not assure protection of Michigan's residents or its natural resources. Revision of existing plans for cleanup at Superfund sites to provide less protection than the public had originally been promised is likely to be controversial and damage the state's credibility with the public.

7. State Revenue/Budgetary Implications:

None.

8. Implications to Local Units of Government:

Local units of government would be confronted by questions about risks posed by sites in their communities that would not be adequately controlled because the state's cleanup and redevelopment program would be significantly compromised by the lack of generic cleanup criteria.

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9. Administrative Rules Implications:

The state's generic cleanup criteria and the basis for site-specific criteria are currently spelled out in promulgated rules. Those rules would be superseded by the provisions of these bills, if enacted.

10. Other Pertinent Information:

None.



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